The Central Law Journal.

SAINT LOUIS, AUGUST 8, 1879.

CURRENT TOPICS.

In *Louisville & Nashville R. Co.* v. *Brownlee*, lately decided by the Court of Appeals of Kentucky, it was ruled that a bill of lading limiting the common law liability of a com mon carrier, is binding on the consignor whether it is read by him or not. From his acceptance of the paper his assent to the conditions contained in it is presumed. "The cases cited," say the court, "are only a few of those in which it has been held by the courts of the different States that the receipt by the consignor of a bill of lading containing a contract restraining or limiting the common law liability of a common carrier, in the absence of fraud or mistake, is binding on him, whether it is read by him or not. All the authoritiet hold that the consignor is not bound to accept or agree to the terms of the special contract in restriction of the carrier's liability; but in such cases it is his duty to refuse to accept the written instrument limiting such liability by returning it to the carrier, after he has had time to ascertain its contents, with notice of his non-acceptance. The weight of authority, both in this country and England, is, that by receiving and accepting the bill of lading the consignor becomes bound by its terms, in the absence of fraud or mistake." The rule in Kentucky is that carriers may limit their common law liability by special contract made without duress imposture or delusion. Adams Ex. Co. v. Guthrie, 9 Bush. 78 (1872); Adams Ex. Co. v. Nock, 2 Duv. 562 (1866), but not for negligence, whether ordinary or gross. Louisville, Cin. & Lex. R. Co. v. Hedger, 9 Bush. 545 (1873); Rhodes v. Louisville, &c., R. Co., 9 Bush. 688 (1873); Orndorff v. Adams Ex. Co., 3 Bush. 194 (1867); Reno v. Hogan, 12 B. Mon. 63 (1851). But they cannot limit their liability by general notice. Louisville R. Co. v. Hedger, 9 Bush. 650 (1873). "No special contract will ever be implied from the mere publication of notice that the carrier will exact conditions different from those prescribed by law. Before the law will enforce special contracts limiting liability, the proof must be clear that such contract was freely made and fully understood." Adams Ex. Co. v. Nock, 2 Duv. 562 (1866).

The case of *Berry v. Pullen*, recently decided by the Supreme Court of Maine, presents a similar feature of the law as to the discharge of sureties to that shown in the Illinois case of *Cassman v. Wohlleben*, reported in full in this issue. In the Maine case it was held that an oral agreement between the payee and the principal maker of a promissory note, that the former will extend the time of payment so long as the latter will pay eight per cent. interest, will not discharge the surety, though made without his knowledge and consent; the agreement not being enforcible on account of the statute of frauds. "One of the most common modes by which creditors let sureties off from their liabilities," says VIRGIN, J., "is by giving time to their principals. Thus if the holder of a promisory note, knowing one of the makers to be a surety for the other, agrees with the principal, without the knowledge and consent of the surety, to enlarge the time of payment thereof even for a day, the surety's liability is thereby terminated. Mere gratuitous forbearance of whatever duration inside the limitation bar, will not discharge; for it is not the forbearance, but the contract which operates the discharge. Page v. Webster, 15 Maine, 249. But before a surety, whose name was deliberately and understandingly placed upon a note to give it credit, can be thus absolved from liability, the law, as well as justice and equity, requires that there shall be a valid, binding contract—one founded on a sufficient consideration, and the effect of which shall be to give further definite time to the principal, without the consent of the surety." The matter of consideration and time in such contracts is copiously illustrated by a large number of cases, English and American, collated in the notes to Leading Cases in Equity, under Rees v. Berrington, pp. 1767 *et seq.*, and Brandt on Suretyship and Guaranty, c. 14 401, Thus, it is said, the true question is whether the agreement to give time, or to vary the contract in any other particular, could have been en-

forced against the creditor, or as a cause of action. Drayer v. Romeyn, 18 Barb. 166. Approved in Wheeler v. Washburn, 24 Vt. 293; Turrill v. Poynton, 23 Vt. 293; Greeley v. Dow, 2 Met. 176. Again, the test is expressed a little differently, being whether the creditor would have made himself liable to the principal by proceeding against him immediately after giving the promise of forbearance; for if he would not, the legal relation of the parties is unchanged, and there is no equitable ground for exoneration of the surety, and, therefore, there can be no discharge. Lead. Cas. *supra*; Leavitt v. Savage, 16 Maine, 72. "By a valid agreement to give time," say the court in Veazie v. Carr, 3 Allen, 14, "is meant an agreement. for the breach of which the maker has a remedy either at law or in equity." And the authorities generally concur in holding that the requisites of a valid agreement are essential, otherwise the creditor is not bound, and the rights of the parties not changed; and if not changed, the original contract is in force and may be performed. There are numerous cases holding that, while the absolute payment by the principal and acceptance by the creditor of usurious interest is a good consideration for an enlargement of the time of payment, an executory contract to pay such interest is not, and that, therefore, it will not absolve a surety. Among the cases in point is the early, well-considered case of Tudor v. Goodloe, 1 B. Mon. 322. See, also, Vilas v. Jones, 10 Paige, 80; Burgess v. Darcy, 33 Vt. 618; Smith v. Hyde, 36 Vt. 303; Myers v. First Nat. Bank, 78 Ill. 257. In a word, all concur in holding that the contract must be binding to effect the release. This rule must exclude oral contracts which the statute of frauds requires to be in writing. And so it has been expressly held. Thus, where the executrix of the acceptor of a bill of exchange orally promised to pay the holder out of her own estate, provided he would forbear to sue, and he did forbear in consequence, it was held that the drawer was not discharged, the promise being within the statute of frauds. Best, C. J., said: "If the promise made by the executrix be considered a promise to pay the debt with interest out of the assets, it gave no claim to the holder beyond what the bill gave him. * * * If it is to be taken to be a personal promise of the executrix, it is void under the statute of frauds, not being in writing." Philpot v. Bryant, 4 Bing. 719; Agee v. Steele, 8 Ala. 948.

Post, page 107.

DIRECTING A VERDICT.

In the recent case of Morgan v. Durfee, 9 Cent. L. J., 12, Sherwood, C. J., speaking for the Supreme Court of Missouri, in his comments on Hinchcliffe's Case, 1 Lew. C. C., 161, uses this language: "That case is also authority for the exercise of the power by a trial court, seldom brought into requisition, however, owing to a pitiable and painful weakness in the *dorsal region*, of *directing a verdict for either party*, where the facts are undisputed, or where the verdict, if returned for the *opposite* party, would be set aside as against the evidence. This doctrine is well established. Proffatt on Jur. Tr., §§ 351, 352, 354 and cases cited."

In almost every volume of our reports we find more or less loose talk to the effect that where there is any evidence, however slight, tending to prove an issue; or where there is a *scintilla* of evidence in support of a case, the trial judge must submit it to the jury. But in every case in which the point is squarely presented and passed upon, the more reasonable doctrine has been held, namely: that it is not only the right, but the duty of trial courts, when the plaintiff has offered no evidence which would be *sufficient in law*, if true, to warrant the jury in finding a verdict in his favor; or where the evidence has no tendency to support the particular issue relied upon for a recovery, to instruct the jury to find for the defendant. Harris v. Woody, 9 Mo. 113; Lee v. David, 11 Mo. 114; Clark v. R. R. Co., 36 Mo. 202; Boland v. R. R. Co., Id. 484; Smith v. R. R. Co., 37 Mo. 287; Callahan v. Warne, 40 Mo. 131; Singleton v. R. R. Co., 41 Mo. 465. In actions to recover damages on account of negligence it has also been repeatedly held in this State that where there is no conflict of evidence in regard to the facts relied on as constituting negligence, it is the duty of the trial court to determine whether such facts do or do not constitute negligence; and that where the facts are undisputed, the court should determine whether they constitute contributory negligence, and so instruct the jury. Maher v. R. R. Co., 64

Mo. 267; Fletcher v. R. R. Co., Id. 484 and cases cited; Houston v. R. R. Co., 6 Cent. L. J. 132; Barton v. R. R., 52 Mo. 258.

Notwithstanding these decisions, and the general current of authority upon this question, our trial courts have been so tenderfooted and exhibited such "a pitiable and painful" want of *backbone*, that we still see them shielding themselves behind that poetic bulwark of our liberties, "trial by jury;" and submitting to juries for their solemn consideration, cases in which there is, under the evidence, no question of fact for the jury. To such an extent has this been carried, that we find our Supreme Court at every recent term saying, in some case, that the demurrer to the evidence should have been sustained; or declaring, as in Holman v. R. R., 62 Mo. 562, that, "under the case made, it was the duty of the court to declare as a matter of law that the plaintiff was not entitled to recover."

So skillful are many of our trial courts in shirking the very responsibility they are elected and paid to assume, and in throwing their own burdens upon the jury, that a lawyerling on his first circuit would be led to believe that Horne Tooke's idea of the functions of the trial judge had been incorporated into our practice act. In a case before Lord Kenyon, Tooke is reported to have said to the jury: "As for the judge and crier, they are here to preserve order; we pay them handsomely for their attendance, and, in their proper sphere, they are of some use; but they are hired as assistants only; they are not and never were intended to be the controllers of our conduct."

Morgan v. Durfee is the first case in this State in which the good common sense of the age has asserted itself in the authoritative announcement of the correct doctrine, that it is within the power of a trial court to *direct a verdict for either party*, "where the facts are undisputed, or where the verdict, if returned for the *opposite* party, would be set aside as against evidence." It goes a step further than the cases above cited. Under it a verdict may be directed for a plaintiff as well as for a defendant; trial courts will see their way clear to renounce the ancient dogma, that wherever there is *some* evidence, or a *scintilla* of evidence, it must go to the jury; and having this authority, it is believed they will find it to be their duty to exercise it in many cases.

The doctrine stated is the well established doctrine of to-day, as will be seen by the cases cited in Proffatt on Jury Trial, §§ 351, 352, 354, and by several other cases not there referred to, which will be hereafter noticed.

It has always been and is to-day the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon. But the jury has no right to assume the truth of any material fact without some evidence *legally sufficient* to establish it. It is often difficult to determine just where the province of the jury ends and that of the court begins, and it is in the application of the principle stated that trial courts most frequently err. Where there is *some* evidence, and there is a question as to its being sufficient in law to support a verdict, it is so much easier for the court to give the jury the benefit of the doubt, and submit the case to them, than to investigate and apply the law to the facts, that they usually let it go to the jury; making no distinction between the terms "any evidence" and "any evidence sufficient in law."

The effect of a demurrer to the evidence and of an instruction to direct a verdict in any case, is to compel the court to apply the law to the facts proved. In making this application the court has to decide what inferences are legitimate, and whether the facts and legitimate inferences support the issue. If they do not support the issue, or make out a case that would sustain a verdict, the court must so declare as a matter of law. While it is the province of the jury to find the facts, yet it is the duty of the court before submitting such facts, to determine first whether they are sufficient in law to support a verdict; for, as has been well said, "evidence which is legally insufficient to make out a case is, *quoad hoc*, no evidence." Again: "If a plaintiff has no case *in law*, he has no business in court; and if a jury can find a verdict upon evidence that does not legally make out a case, they may find a verdict on no evidence at all." Nolan v. Shickle, 3 Mo. App. 300; State v. Thayer, 5 Mo App. 420. The former is a review of many of the leading cases relating to demurrers to evidence, and the conclusion is, that "the

question whether the evidence will sustain a verdict is purely a question of law—a question as to the legal effect of ascertained facts."

The latter grows out of a case which strongly illustrates the beauties (?) of a trial by jury in this fast age, when the average juror flatters himself that he knows more law than the court. On the trial of the original action, the plaintiff failing to make his case, the jury were instructed that "under the pleadings and the evidence the plaintiff is not entitled to recover;" the plaintiff refused to take a nonsuit; the jury retired, but soon returned into court, under their oaths, in the exercise of their peculiar province to find the facts, a verdict for the *plaintiff* for $4,300! Of course the verdict was not permitted to stand, and the case is here mentioned merely as a sample of what juries will do if permitted to pass upon the facts in every case regardless of the applied law to such facts. That such verdicts are sometimes rendered, and the well known solicitude of trial courts for the preservation of the right of the jury to pass upon all facts, not less than the human weakness shown in their proneness to lighten and lessen their own responsibilities, are a sufficient guarantee that the rule laid down by Sherwood, C. J., in the principal case, in such plain, unmistakable language, will be hailed with satisfaction by all members of the bar, except that class who still insist on submitting all issues in all cases to the jury.

In Brown v. European, &c., Co., 58 Me. 389, Appleton, C. J., said: "Where the facts are not controverted a nonsuit may properly be granted, if a verdict in favor of the plaintiff would be set aside as against evidence. It would be absurd to send a cause to a jury when a verdict, if rendered in favor of the plaintiff, would not be permitted to stand. It is no interference with the province of the jury to give judgment upon admitted facts. When the evidence fails to show any cause of action a non-suit should be ordered." In Steves v. R. Co., 18 N. Y. 425, the trial court, having the requisite strength in its "dorsal region," had sustained a demurrer to plaintiff's evidence, and ordered a non-suit. It is said: "It would have been the duty of the court to set aside such a verdict as unsupported by evidence. Upon this ground *alone* the nonsuit was properly granted." In Pleasants v. Fant, 22 Wall. 122, the rule is thus stated: "If the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." In Wilds v. R. R. Co., 24 N. Y. 433, it is said that "cases of negligence form no exception to the rule, that it is the duty of the trial court to nonsuit, where the verdict for a plaintiff would be clearly against the evidence * * and no court can be guilty of the absurdity of holding, that in such a case, it would not be competent for the judge who tried the cause, either to nonsuit the plaintiff or direct a verdict in his favor as the case might have required. No legal principle compels him to allow a jury to render a merely idle verdict." In Commissioners v. Clarke, 94 U. S. 284, Mr. Justice Clifford speaking for the court said: "Judges are no longer required to submit a case to the jury merely because *some* evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury, but the modern decisions have established a more reasonable rule, to wit: That before the evidence is left to the jury, there is, or may be, in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

In Merchants Bank v. State Bank, 10 Wall. 637, the trial court, by an instruction, had taken the case from the jury and directed a verdict for the defendants. Mr. Justice Swayne speaking for the court said, "According to the settled practice in the courts of the United States it was proper to give the instruction, if it were clear the plaintiff could not recover. It would have been idle to proceed further when such would be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which

separates the provinces of the judge and jury, and *fixes where it belongs the responsibility which should be assumed by the courts.*"

H. C. McD.

WHAT IS A CALENDAR MONTH.

MIGOTTI v. COLVILLE.

English Court of Appeal, June, 1879.

One calendar month's imprisonment, when commencing on a day other than the first of the month, dates from the day of imprisonment to the corresponding numerical day, less one, in the next month in the calendar. If, owing to the shortness of the next month, there is no such corresponding day, the imprisonment will terminate on the last day of such next month.

Appeal of the plaintiff from a judgment after trial before Denman, J.

The statement of claim alleged that the plaintiff had been kept in prison by the defendant, the Governor of Coldbath Fields prison, one day longer than his sentence, and claimed damages accordingly.

The plaintiff was sentenced on October 31 to two terms of imprisonment—first, one calendar month, and second, fourteen days, to commence at the expiration of the month's imprisonment. He was liberated on December 14th. Denman, J., gave judgment for the defendant.

The plaintiff in person contended that the imprisonment for one calendar month dated from 12 P. M. on the 30th of October, and ended at 12 P. M. on the 29th of November, and that fourteen days from then would expire on December 13th, when he should have been set free.

A. L. Smith, for the defendant, was not called on.

BRAMWELL, L. J.:

I am of opinion that this judgment must be affirmed. It is, no doubt, a plausible argument of the plaintiff's that he has been imprisoned the whole of the month of November and a day in October as constituting "one calendar month." The difficulty arises from this, that really the term "one calendar month" has no application except to a particular month, and is inaccurate as applied to a period which begins in the middle or part of one calendar month, and ends in the middle or part of another calendar month. In that case "one calendar month" is made up of a portion of two calendar months, and various consequences seem to follow from that. It seems to me clear that the only sensible rule that we can lay down is, that where the imprisonment begins on a day in one month, so many days of the next month must be taken, if there are enough, as will come up to the date of the day before that day of the month on which the imprisonment commenced. That is to say, if the imprisonment commenced on the 5th of one month, you must take till the 4th of the next month, if on the 25th of one till the 24th of the next month, and so on. You must take so many days out of the next month as have passed in the month when the imprisonment began, before the commencement of that imprisonment. If that were not so, look at the consequences. The plaintiff says, "I was sent to prison in October 31, and therefore ought to have been let out on November 29, because, otherwise, I should have had a calendar month and a day of another month"; but, of course, if he had been sent to prison on October 29 he ought to have come out on November 28, and if on October 30 on November 29. The effect of his argument, therefore, is this, that whereas, if the imprisonment began on October 30 it ought to end on the 29th of November, so ought it if it began on the 31st. There is no reason for that. Suppose the plaintiff had been sentenced to two months, when would he have come out? Certainly not till December 30. If one month ends on November 29, how do you get the next month ending on December 30? That, undoubtedly, would be the case. The only way to make sense of it is to apply the rule which I have mentioned; and it seems to me that the rule will never operate to the prejudice of a prisoner. If he is sent to prison in what may be called a long month, he is a sufferer and gets thirty-one days; if sent to prison in a short month of thirty days he gets thirty days only; and if sent to prison in the shortest month of all, February, so much the better for him; for, according to the rule expressed, if a man went to prison on the 29th of January he would get out on the 28th of February; so if he went to prison on the 30th of January, and so if on the 31st, and so if on February 1st; he would have the benefit of an imprisonment which is shortened inevitably by there not being a sufficient number of days in the following month to make up for the days elapsed in the month in which he was sent to prison at the time of his imprisonment. I think in this case that, as the plaintiff was sent to prison on October 31, there were thirty days to be taken out of the next month, and as a consequence the month did not expire till the 30th of November; and if so, the fourteen days did not begin till December 1, and, therefore, the plaintiff was duly kept in prison till the 14th of December. I think that Mr. Justice Denman was right in his judgment, and that it must be affirmed.

BRETT, L. J.:

The expression "a calendar month" is a technical and legal phrase, and we are bound to give it a technical and legal meaning. The legal meaning of a calendar month is not a fixed number of days, but it is a month in the calendar; it is one month to be calculated by the calendar and not by counting the days; and one month according to the calendar is one month from the first day of the imprisonment to the corresponding numerical day, less one, in the next month in the calendar. In some cases there is no such corresponding numerical day in consequence of the shortness of the next month in the calendar. If so, as there is no corresponding numerical day, but a less number of

days in the month, then, in favor of the prisoner, the imprisonment is less than it otherwise would be, and must end on the last day of the short month.

COTTON, L. J.

I am also of the opinion that Mr. Justice Denman was right. I think that a great deal of the matter is disposed of by considering whether or no Mr. Justice Denman was right in himself dealing with this question as a matter of law, and I am of opinion that he was. It is not a question of measurement as a matter of fact for the jury, but for the judge to say what, under the circumstances of the case, is the proper meaning of a sentence of one calendar month's imprisonment. It is true that unless the imprisonment begins on the first day of a particular month to be found in the calendar, a person can not be imprisoned, if sentenced for one calendar month during one actual calendar month. What, then, is the meaning of "one calendar month" when imprisonment begins on a day other than the first day of the month? I think the rule to be applied is that laid down by Mr. Justice Denman and the members of this court—viz., that such a sentence must be considered as ending at twelve o'clock on the day immediately preceding the corresponding day in the next month in the calendar. The corresponding day in the next calendar month is, in my opinion, the corresponding numerical day, if there is one; if there is not one, then, in favor of the prisoner, the sentence will expire on the last day of such next month.

Appeal dismissed.

PRINCIPAL AND SURETY—PROMISSORY NOTE.

CASSMAN v. WOHLLEBEN.

Supreme Court of Illinois.

[Filed at Ottawa, February 22, 1879.]

An agreement to extend the time of payment of a promissory note, in order to relieve the surety, must be for a valuable consideration and binding upon both parties. A mere agreement to extend the time of payment for an indefinite period of time, and without the payment of interest in advance, would not constitute a sufficient consideration and create a binding agreement, so as to relieve the surety.

On the 28th of July, 1876, judgment was entered by confession upon a cognovit, in favor of Wohlleben against Roelle and Cassman for $787 23, under a power of attorney, authorizing the same to be done upon a promissory note in these words:

CHICAGO, March 8, 1873.

$700 00.

On one year after date, for value received, we promise to pay to the order of John Wohlleben seven hundred dollars with interest at the rate of ten per cent. per annum after date until paid, and payable at our office.

H. T. ROELLE,
MATTHIAS CASSMAN.

At the time of the entry of this judgment the following indorsements appeared upon the note:

This note is extended to six months, interest paid up to March 8, 1874.

Note extended for six months to March 8, 1875, interest paid to September 8, 1874.

Interest paid on this note to March 8, 1875, and is extended to September 8, 1875.

Interest paid on this note to September 8, 1875, and is extended to March 8, 1876.

At the next term of that court (August term 1876) Cassman moved that as to him this judgment should be vacated and set aside and that he be allowed to plead to the merits and in support of the motion filed his own affidavit, stating that he had signed the note in question merely as surety for Roelle; that he received no part of the consideration of the note and that this was known to the plaintiff; that after the note became due, the plaintiff agreed with Roelle to extend the time of payment of said note to the 8th of March, 1875; that about the 8th of March, 1875, plaintiff agreed to extend the time of the note to the 8th of September, 1875; and that on the 8th of September, 1875, plaintiff agreed with Roelle to extend the time of payment to the 8th of March, 1876; that said extensions were made upon valuable and sufficient consideration passing from Roelle to Wohlleben, to wit, upon this promise of Roelle to pay Wohlleben interest on said principal during the period of such extension at the rate of ten per cent. per annum; and the said Roelle has actually paid such interest to Wohlleben during said periods; that these several agreements were made without the knowledge or consent of affiant; that he had no knowledge of either of them until the day before the judgment was rendered; and that he had not since consented to or ratified either of them or promised to pay the note.

Affiant further says that he has a good defense to said action upon the merits of the whole of the plaintiff's demand.

The superior court overruled the motion to set aside the judgment. To this ruling Cassman excepted and brings the record here by writ of error and asks the reversal of the judgment.

DICKEY, J., delivered the opinion of the court:

It is well settled that when the payee of a promissory note, executed by a principal and a security, makes a binding agreement with the principal debtor, without the consent of the security, to extend the time of payment of the note, the security is thereby discharged from his liability. The question presented here is whether the record shows that such an agreement was made in this case between the payee of the note and the principal debtor.

It is said by Reed, J., in McComb v. Kittridge, 14 Ohio 351. "It is just as competent for the principals to a note to extend the time of payment for a specified period, as it was to fix the time of payment originally. If the lender of money

secured by a note, after the same becomes due, contracts with the borrower that the time of paying the same shall be extended for one year or for any other period, upon consideration that the borrower shall pay the legal or less rate of interest, why should not the contract be binding? The lender by this contract secures for himself the interest on his money for the year, and the borrower precludes himself from getting rid of the payment of interest, by discharging the principal. It is a valuable right to have money placed at interest, and it is a valuable right to have the privilege at any time of getting rid of the payment of interest, by discharging the principal. By this contract the right to interest is secured for a given period, and the right to pay off the principal and get rid of the interest is also relinquished for such period. Here, then, are all the elements of a binding contract. But it is said there is no consideration for the extension of time, because the law gives six per cent. after the note is due. But the law does not secure the payment of this interest for any given period, or prevent the discharge of the principal at any moment. There is precisely the same consideration for the extension of the time as there was for the original loan." Even if this view be conceded, it is essential, however, that both parties shall be bound by the contract of extension, otherwise there is no consideration for the agreement of the creditor to extend the time.

In Woolford v. Dow, 34 Ill. 428 (a case not unlike the present), this court said: "The note was due six months after date, with ten per cent. interest." The answer set up—that after the note became due defendant in error (the creditor) agreed with them (the principal debtors) "to extend the time of payment *if they wanted*, and pay ten per cent. interest and one hundred dollars each month, in liquidation of the note until it should be paid. It will be perceived that they state no new consideration to sustain the agreement. The note, by its terms, drew ten per cent. interest, and this agreement made no change in its terms as to the rate of interest. A credit is indorsed upon the note of one hundred dollars for interest to the 9th day of February, 1862; but it does not appear to have been paid in advance. For aught that appears it was paid on that day, and if so, it was then due. Had this interest been paid in advance, it would have constituted a consideration for the agreement; but so far as this record discloses, the agreement to extend the time of payment * * * was a mere *nudum pactum*."

In the case at bar there is no consideration, either by promise on the part of the debtor to keep the money any given time and pay interest for that time, or by paying the interest in advance for any given time. The payment of interest already accrued is not a consideration—a mere promise of indulgence on payment of interest at the rate named in the note or at any other rate, is not binding without something to bind the debtor to pay interest for a given time. A payment of interest in advance would answer, and by the Ohio case a promise by the principal debtor to keep the money a given time at a given rate of interest would be such a consideration as would support and make binding the promise by the creditor to extend the payment for a given time.

It is essential in all such cases that both parties should be bound by the agreement or that it should have mutuality. The record in this case fails to show specifically that the principal debtor at any time bound himself to keep the money and pay the interest upon it for any specified time, or that he even paid interest in advance. The indorsements upon the note are presumed to have been made by the creditor, and may have been consented to by the principal debtor. These indorsements of the payment of interest fail to show any payment of interest in advance. None of these indorsements show a contract on the part of the debtor to keep the money for any given time. The affidavit on this subject fails to show unequivocally that there was any consideration for the agreement of the creditor to extend the time of payment. The affidavit states that Roelle agreed with the defendant to extend the time from time to time, but it does not state that Roelle paid interest in advance for the extension, or that he agreed to keep the money until the end of the respective extensions or until the end of either of them, or for any given time.

In applications to set aside judgments entered by default or entered in *ex parte* proceedings, affidavits in support of such applications are to be construed most strongly against the party making the application. It is not sufficient to state facts from which if proved on trial a defense might be inferred. We think the affidavit in this case fails to make out a case for the plaintiff in error in this, that it fails to show unequivocally that Roelle bound himself so that he could not, if he chose, have paid off the principal and accrued interest, at any given time, and have thus discharged the debt even before the period of extension had expired. A mere promise made by a creditor to indulge the debtor for a given length of time upon the payment of interest does not bind him to such extension, because the payment of interest is already secured by the terms of the original note for any delay that may occur from any indulgence that might be given; and unless the debtor is also bound by the contract to retain the money for a given length of time and to pay the interest for that period, whether he retains the money that length of time or not, such promise by the creditor lacks consideration and is not binding upon either party. For aught that appears in this case the creditor might, notwithstanding the extensions which he had agreed to, have brought suit at any time upon this note, and the principal debtor or the security might have at any time discharged the debt and cancelled his obligation by the payment or tender to the creditor of the principal of the note and the unpaid interest accrued up to the date of such payment or tender; and this at any time before the expiration of the time of the so-called extensions.

Judgment affirmed.

Same effect.
Buckles v. Huff. 53 Ind. 474
Manifee v. Clark 35 Ind. 304
Holabird v. Brown 17 " 202 + citations.
principle applied to Sureties.
Gerard v. Tripplett Et al. 62 Ind. 122

Also
White v. Whitney 51 Ind. 124
Huff v. Cole 45 " 300
Jarvis v. Hiatt 43 " 163
Piner v. Goldsberry 31 " 52
Cross v. Wood. 30 " 378

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—DUTY OF OWNER OF PREMISES TO LICENSEE.

PARKER v. PORTLAND PUBLISHING CO.

Supreme Court of Maine, February, 1879.

1. CONTRIBUTORY NEGLIGENCE—DUTY OF ONE ENTERING PREMISES.—One entering the premises of another, whether by invitation, or as a mere licensee, is himself bound to exercise ordinary care and diligence, and failing in this and suffering injury, he can not recover.

2. FALLING THROUGH ELEVATOR WAY.—P having occasion to carry an advertisement to the defendant for publication in its newspaper late at night, found the counting-room closed. He thereupon proceeded to the editorial rooms on the second floor. At the head of the stairs there was a hall; on the right hand the door leading to the editorial rooms, and on the left an elevator entrance with folding doors. P, being a stranger to the premises, and the hall being dark, in trying to find his way fell down the elevator way, the doors of which had been left open, and was seriously injured. *Semble*, that his want of care and prudence having caused the injury he could not recover.

3. NEGLIGENCE — EVIDENCE OF PRIOR CIRCUMSTANCES IRRELEVANT.—In an action on the case for negligence, the evidence must be confined to the time and place and circumstances of the injury, and the negligence then and there; but what occurred to others, at other times, more or less remote, is collateral and inadmissible. Thus, where one is charged with negligence in not sufficiently lighting the hall and passage-way to his place of business, and in leaving open the doors to his elevator-way: *Held*, that evidence, embracing a period of two years, tending to show at different times the condition of the hall and entrance-way as to light—whether more or less, or none—the position of the elevator gates and doors, of what had happened to others at different times, and their fortunate escape from peril, was not admissible.

4. ORDINARY CARE AND DILIGENCE must be used to keep business places, and the usual passage-way to them, safe for the access of all persons coming to them at all reasonable hours, by their invitation express or implied, or for any purpose beneficial to them.

5. NO DUTY IS OWED TO A MERE LICENSEE, and he has no cause of action for negligence in the place he is permitted to enter.

Action on the case for negligence. Plea, general issue. Verdict for plaintiff for $4,000. The facts, and so much of the bill of exceptions as are necessary to the understanding of the points decided, appear in the opinion.

S. C. Andrews, *A. A. Strout* and *G. F. Holmes*, for the plaintiff; *T. B. Reed*, for the defendant.

APPLETON, C. J., delivered the opinion of the court:

This is an action on the case for negligence. The defendants had their counting-room on Exchange street, on the lower floor. The editorial and composing rooms were on the second floor. At the head of the stairs is a hall, on the right hand is the door leading to defendants' rooms, and on the left is an elevator-way with folding doors. The plaintiff, as he alleges, on the 17th of September, 1875, between eleven and twelve o'clock at night, was proceeding to the defendants' rooms on the second floor, the counting-room being closed, for the purpose of procuring the insertion of a notice in the newspaper published by them, when, there being no sufficient light in the hall, and the doors to the elevator-way being left open, he fell down the elevator-way and was seriously injured.

The question for determination was, whether there was negligence on the part of the defendants, at the time when, and the place where, the plaintiff sustained the injury for which he seeks compensation; not whether there was negligence at other times and under different conditions. If the defendants are liable, they are not liable for past neglects, when an injury might have occurred but did not. Nor do previous omissions of duty prove, or tend to prove, the particular neglect of which the plaintiff complains.

Evidence, embracing a period of two years, tending to show at different times the conditions of the hall-way, and entrance to the press, editorial and composing rooms, as to light—whether more or less, or none—of the position of the elevator gate and doors, of what had happened to other men at other times, and of their fortunate escape from peril, was received, notwithstanding the seasonable and strenuous objections of the defendants.

These facts were all collateral to the main issue, and should have been excluded; "and the reason is, that such evidence tends to draw away the minds of the jury from the point in issue, and to excite, prejudice and mislead them; and, moreover, the adverse party, having no notice of such a course of evidence, is not prepared to rebut it." 1 Greenl. Ev., § 52. "It may be added, that the evidence not being to a material point, the witness could not be indicted for perjury if it were false." 1 Greenl. Ev., § 448. It was immaterial to the issue, whether, on some particular day or night previous to the plaintiff's injury, the gates to the elevator had been closed or not; whether there had been sufficient light in the hall or not, or whether some individual had or had not been exposed to injury and had escaped. If evidence of this character is receivable, contradictory proofs would be admissible, and there would be as many collateral issues as there were collateral facts and witnesses testifying to them.

The entire weight of judicial authority is against the reception of the evidence received subject to objection. The attention of the jury would be diverted from the questions really in dispute, and directed to what is entirely collateral. Hubbard v. A. & K. Railroad Co., 39 Maine, 506; Aldrich v. Pelham, 1 Gray, 510; Kidder v. Dunstable, 11 Gray, 342; Collins v. Dorchester, 6 Cush. 396; Gahagan v. B. & L. R. Co., 1 Allen, 187; Baltimore & Susquehannah R. R. Co. v. Woodruff, 4 Md. 242; Schoonmaker v. Wilbraham, 110 Mass. 134. "The evidence of what had happened at the same place the year before," observes Gray, C. J., in Blair v. Pelham, 118 Mass. 420, "was rightly rejected; because it tended to raise a collateral

issue; because, it being admitted that the highway had been in the same condition for twenty-four hours before the injury now sued for, the previous length of time for which it had existed was immaterial."

The case of Edwards v. Ottawa Riv. Nav. Co., 39 U. C. Q. B. 264, was an action against the defendant for negligence in the construction and management of their steamboat, by which sparks escaped from the funnel at the wharf, and the plaintiff's lumber and mills were burnt. The alleged negligence consisted in leaving the screens of the steamer open; and, on the part of the plaintiff, evidence was received, though objected to, that on other occasions and at different times and places, the screens were open and cinders escaped. The presiding judge ruled that this evidence was admissible. *Held*, that such evidence was inadmissible to support the plaintiff's case, when it was tendered and received. All the English and American cases bearing on this question were examined and discussed by Harrison, C. J., who, after stating the facts, says: "The declaration charges negligence by the defendants on a particular occasion and at a particular place, whereby, etc., and this the defendants deny. The only issue, therefore, for the determination of the jury, was whether there was the negligence charged, on the occasion and at the place alleged, resulting in damage to some amount to the plaintiff. If, on the day and at the place in question, the screens were open and sparks escaped, one or more of which sparks set fire to the pile of lumber, there was such negligence and such damage as alleged, and the jury should find for the plaintiff. It could not assist the jury in coming to a determination on that issue to show that, on other days and at other places, the screens were open and sparks escaped. Such evidence would, in my opinion, be more likely to mislead than to assist the jury in arriving at a proper determination." So in this case, what was done or omitted to be done, at other times, is immaterial.

As the case is one of grave importance, it may not be inexpedient to consider the various legal questions, which may arise in its different aspects in the trial of the case hereafter.

The defendants are only responsible for neglect of duty. They are bound to use ordinary and common care and diligence to keep the premises and the usual passage-way to them safe for the access of all persons coming to them at seasonable hours by their invitation, express or implied, or for any purpose beneficial to them, they exercising ordinary care in so coming. If the premises are in any respect dangerous, they are bound to give such visitors notice, to enable them with ordinary care to avoid the danger. Knight v. P. & S. & P. Railroad Co., 56 Maine, 235; Campbell v. Portland Sugar Co., 62 Maine, 552; Elliot v. Pray, 10 Allen, 378; Sweeny v. Old Colony & Newport Railroad Co., 10 Allen, 369; Chapman v. Rothwell, 96 E. C. L. 168; John v. Bacon, L. R. 5 C. P. 437. Such are the general principles of law applicable to the case.

The counting room of the defendants was on the lower floor. This was the defendants' place of business. The editorial and composition rooms were in the second story. If there was an implied invitation, or permission merely, as a matter of accommodation, as the defendants' witnesses testified, the question would arise, if an invitation, whether such invitation could be implied after business hours and through the night, when the inhospitable absence of light would seem to negative such invitation.

But it is well settled, if the plaintiff was at the place where the injury was received by license merely, that the defendants would owe him no duty, and that he can not recover. In Holmes v. N. E R. W. Co., L. R. 4 Ex. 257, Bramwell, B., said: "If the plaintiff had gone where he did by mere license of the defendants, he would have gone there subject to all the risks attending his going" In the same case, Channel, B., remarked: "I quite concur in the rule laid down by the cases, that where a person is a mere licensee, he has no cause of action on account of dangers existing in the place he is permitted to enter." In Blackman v. Toronto Street Railway Co., 38 U. C. Q. B. 173, the deceased, a boy selling newspapers, got on a street railway car at the rear end and passed through the car to the front platform, where the driver was standing; he stepped to one side behind the driver and fell off, there being no step on that side, and was killed by the car running over him. The boy had paid no fare. It appeared that newsboys were allowed to enter the cars to sell newspapers without being charged. It was held that no right of action existed against the defendant; that there was no breach of duty to him, and that he must take the cars as he found them. "Assuming," says Burton, J., "for the purposes of this case, that the defendant would be bound by any license or permission given to the deceased by the driver, he was, at best, in the position of a licensee, and, although whilst there the defendants would not be justified in injuring him, by careless driving, any more than they would be by reckless driving over him if on the street, it is clear there was no duty on the part of the defendants, as regards the deceased, to have the steps of the cars in any other condition from that in which he found them when he availed himself of the permission to enter. He acquired no right, and whatever may have been the obligation of the defendants as regards their passengers, they owed no duty to the deceased to keep the car in repair." In the same case, Moss, J., remarks: "The passengers may have the right to insist that the car shall be free from patent defects, as the Court of Queen's Bench holds, but the licensee must take the vehicle as it is. He cannot claim that it should have been safer or stronger." "If," remarks Hagarty, C. J., "in the hall or office of a large hotel newsboys or others were seen coming in and going out, offering newspapers, etc., for sale, I do not think there would be any implication in the event of an accident that such persons were guests in the hotel, or were there under any contract, express or implied, with the host or owner that the premises should be in any particular order or condition."

The distinction between what is due to one on the premises by invitation and a mere licensee, was fully considered and discussed in an elaborate opinion of Lord Chief Baron Lefroy, in the case of Sullivan, ex'r, v. Waters, 14 Irish Com. L. 466. The case came before the court on demurrer to a summons and plaint brought by the widow and administratrix of Patrick Sullivan, claiming damages from the defendants under Lord Campbell's act, on the ground that the death of Patrick Sullivan was occasioned by the negligence of the defendant. The negligence relied on is stated to consist in the permitting an aperture in the loft of the defendant to remain unguarded and neglected, by reason of which the deceased, passing along the floor of the loft, fell through the aperture and received injuries of which he died. The statements in the declaration, observes the Chief Baron, are, in substance, "that the defendant, at the time of the grievances in question, was in the possession of a distillery and loft connected with it; that Patrick Sullivan was employed by him as a laborer to do certain work about the distillery at night; that Patrick Sullivan, as such laborer, had, whilst so employed, access by the license of the defendant to one of the said lofts at night, and by such license used one of said lofts for the purpose of sleeping during the intervals of the night when he was not actually engaged in said employment. The summons and plaint then proceeds (in the form of an assignment of a breach) to assert: Yet the defendant, well knowing the premises, wrongfully and negligently permitted a certain aperture, then being in the floor of said loft, to remain open, without being properly guarded and lighted, by reason whereof the said Patrick Sullivan, whilst passing along the floor of said loft in pursuance of said license, fell through the said aperture, and was thereby wounded and injured; and, by reason of the wounds and injuries thereby occasioned to him as aforesaid, the said Patrick Sullivan, afterwards and within twelve months before this suit, died. The pleading states that the deceased had access to the loft, for the purpose of sleeping, by the license of the defendant; which negatives that he used the loft for that purpose under the contract of his employment. It is, therefore, quite plain that, if any obligation towards the deceased existed in the defendant to guard or light the aperture, such obligation must have arisen from the license to use the loft at night, and from the fact that the deceased used the loft in pursurance to such license." After an elaborate and exhaustive review of all the authorities, the Chief Baron concludes thus: "The deceased took the permission to sleep at the loft, instead of remaining up at night or sleeping elsewhere, during the intervals when he was not engaged in the business of the defendant. He must, I think, be considered as having taken the permission (to apply the language of Williams, J., in Hansel v. Smith, 7 C. B., N. S. 731) 'with its concomitant conditions, and, it may be, perils.' Under such circumstances he became his own insurer."

Whatever may be the position of the plaintiff, whether there by express or implied invitation, or as a mere licensee (his presence being simply permissible), he was bound to exercise common care and caution. He wished to find the press office. He had never been there and did not know where it was. He was ignorant after he got to the head of the stairs as to the location of the door leading from the passage-way into the editorial rooms of the defendants. It was dark and he was a stranger to the premises. The alternative in such a case, as presented by Bramwell, B., in ordering a nonsuit was that, "if it was so dark that the plaintiff could not see, he ought not to have proceeded without a light; if it was sufficiently light for him to see, he might have avoided the staircase, which is a different thing from a hole or trap-door through which a person may fall." Wilkinson v. Fairie, 1 H. & C. 633. "In general," remarks Pollock, C. B., in that case, "it is the duty of every person to take care of his own safety, and not to walk along a dark passage without a light to disclose to him any danger." In Forsyth v. Boston and Albany R. R. Co., 103 Mass. 513, it appeared that the plaintiff was a passenger in the defendants' cars at night, at a station of the defendants', on one of two platforms extending along each side of the track to a highway (which, as the plaintiff knew, crossed the railroad), and having a step at the end next the highway; that, instead of walking along the platform, he voluntarily stepped from it, with the intention of going obliquely across the track to the highway, and when he stepped off fell into a cattle guard dug across the track and was injured; that the night was so dark that he felt with his foot to find the edge of the platform; and that he did nothing to ascertain what would be found on stepping from the platform. *Held*, that he was not in the exercise of due care, and could not recover, because he did not take any precaution to ascertain if he could not make a step with safety. In Pierce v. Whitcomb, 48 Vt. 127, the facts were these: The plaintiff and defendant were farmers. The plaintiff went to the defendant's late in the evening to buy some oats. The defendant kept his granary locked. He obtained the key and went with the plaintiff to the upper floor of the granary where the oats were, and, while the defendant went for a measure, the plaintiff walked about the floor in the dark, fell through an aperture therein, and was injured. *Held*, that the defendant was not liable for the injury. If the plaintiff's want of common care and prudence was the cause of his injury, he has only himself to blame, and cannot recover.

Exceptions sustained.

WALTON, DANFORTH, PETERS and LIBBY, J. J., concurred. VIRGIN, J., concurred in the result.

THE proper measure of damages in a suit by the purchaser of a safe against the manufacturer, who warranted it "burglar-proof," is the difference between the value of the safe as it was and what it would have been worth if it had been as represented, and not the damages sustained in the loss of valuables taken out of the safe by burglars.—*Herring v. Skaggs.* Supreme Court of Alabama.

INSURANCE COMPANY—NEGOTIABLE PAPER—FRAUD.

ALEXANDER v. HORNER.

United States Circuit Court, Eastern District of Arkansas, April Term, 1879.

1. POWERS OF INSURANCE COMPANIES—NEGOTIABLE PAPER.—Insurance companies have the power to take and hold negotiable notes and other securities in the general conduct of their business, and this includes the power to negotiate them.

2. PROMISSORY NOTE—PAYMENT—FRAUD. — The maker of a note, who pays it to an indorsee and holder who obtained it by fraud, is discharged from liability thereon to the payee, unless the maker had notice of such fraud; and the discharge extends as well to the original consideration.

3. PARTIES.—Where, in such a case, the payee files a bill in equity to avoid the assignment and compel the maker to pay the note a second time, upon the ground that he had notice of the fraud, the alleged fraudulent indorsee to whom the payment was made is an indispensable party.

4. PRACTICE— NON-JOINDER OF PARTIES. — The objection of the non-joinder of necessary parties is not required to be raised by the pleadings; it may be made on the hearing and it may, and in a clear case, ought to be raised and acted upon by the court on its own motion.

L. E. Alexander, as receiver of the Columbia Life Insurance Company, and the company, are named as plaintiffs in the bill which alleges that the company is a Missouri corporation; that on the 18th of October, 1877, it was, by decree of the circuit court of St. Louis County, adjudged to be insolvent and enjoined from doing further business, and the plaintiff, Alexander, appointed receiver of its property and assets, with authority to sue for their recovery, etc.; that pursuant to the terms of the decree, the company executed an assignment of all its property and assets to the receiver, and by the terms of the same decree the corporation was dissolved.

The bill alleges further, that on the 29th of November, 1872, the defendants were "indebted" (it is not alleged this indebtedness was for a stock subscription or how it arose) to the Mound City Mutual Life Insurance Company in the sum of $5,830, for which sum they made their notes, payable to the company, and secured the same by deed of trust on lands in Arkansas; that the name of the last-mentioned corporation was changed successively, to Mound City Life Insurance Company, to St. Louis Life Insurance Company, and lastly to Columbia Life Insurance Company, but the corporation continued the same; that the company was insolvent on the 23d of November, 1875, and for some time prior to that date, and so continued until it was judicially declared to be insolvent; that on the 23d of November, 1875, a combination was entered into between Alfred M. Britton and George J. Davis, both of whom were directors in the Life Insurance Company (the former its vice-president and acting president and the latter an attorney for the company) and the Life Association of America, to get possession of the assets of the Life Insurance Company by fraudulent means; that in execution of this fraudulent scheme, Britton, Davis, and the Life Association, in December, 1875, obtained possession of the notes of the defendants and the deed of trust given to secure the same, and cancelled and delivered them to the defendants; that the Life Insurance Company received no consideration from Britton, Davis, or the Life Association for these notes, and that the defendants paid nothing for their surrender, but only gave in exchange therefor shares of stock in the company, which were worthless, because the same had never been paid for and because the company was insolvent; and that defendants had notice of these alleged facts. Horner and Horner, the makers of the notes and who are citizens of Arkansas, and Britton, the trustee named in the deed of trust and who is a citizen of Texas, are made defendants. Davis and the Life Association of America are not made defendants, because they are, as the bill alleges, beyond the jurisdiction of the court, and cannot be joined without ousting the jurisdiction, being citizens of the same State as the plaintiff.

Prayer for decree for amount of notes and foreclosure of deed of trust

The defendants answering say, the notes were given by them in payment for $5,000, subscription to the capital stock of the company; that the stock issued to them was full paid stock; they deny all knowledge of the insolvency of the company, or of any conspiracy or fraud on the part of Britton, Davis, and the Life Association of America to obtain possession of their notes; and allege that in the month of November, 1875, they were advised by another stockholder residing in Helena, that Britton, upon whose representations they subscribed for the stock and in whom they had confidence, was about to retire from the directory of the company; that they could then sell their stock for par, or possibly something more, to parties who were buying it up; that after consultation the Helena stockholders reluctantly agreed to sell their stock, because they believed it was actually worth much above par if the true condition of the company could be known, and they only consented to sell for the reason that they could not be on the ground personally to ascertain and look after their interests, and believed if they did not sell, some means would be resorted to, to crowd them out; that thereupon they sent their certificates of shares of stock in the company, indorsed in blank, to Herman & Rainey, their correspondents in St. Louis, and authorized them to sell the same, but in no event for a less sum than would be sufficient to pay off their notes then held by the company; that their correspondents afterwards advised them that they had sold their stock to George J. Davis, and taken in payment their notes due to the company and $176 80 in money, and inclosed a check for that sum, and their notes duly assigned by the company to Davis, and by him cancelled, and also a deed of release of the

deed of trust executed by Britton, the trustee; that they never heard of George J. Davis until they saw he was the a-signee of their notes, and were informed by their correspondents that he had purchased their stock; that they believed the company was solvent, and would not have sold their stock for less than par; that they acted in good faith, and had no suspicion of any fraud, or that fraud was charged upon any one in connection with the transaction until the filing of the bill in February, 1878, more than three years afterwards, and these allegations of the answer are well supported by the evidence.

It is shown by the evidence that on the 23d of November, 1875, the Life Association of America entered into a contract with George J. Davis by which the former agreed to purchase from the latter 9,400 shares of the capital stock of the St. Louis Life Insurance Company, and as much more, up to 10,000 shares (the whole capital stock of the company), as Davis might transfer and deliver within thirty days. Contemporaneously with the delivery of the stock of the Insurance Company, Davis was also to deliver to the Life Association certain other stocks and securities mentioned in the contract, then owned by the Insurance Company.

Davis was to receive for the 9,400 shares and other securities $1,215,000, and par value for all shares delivered in excess of that number. The mode of paying Davis for this stock and securities was prescribed with some detail, the substance of which was, that about ninety per cent. of the sum was to be paid in the draft of Hough, President of the Life Association on the Life Association, and accepted by it, payable at one day's sight, and the remainder in cash, on delivery of the stock and other securities mentioned in the contract.

Having made this contract with the Life Association, Davis resigned as a director of the Insurance Company, and on the 30th of November, 1875, made a proposition to the Life Insurance Company to purchase from it the securities mentioned in his contract with the Life Association at prices stated in his proposition; and at a meeting of the board of directors of the Life Insurance Company on that day, the record shows the following proceedings were had:

"Mr. Davis then submitted a list of securities belonging to the company which he desired to purchase, the price being satisfactory and for payment of which he would give the draft of H. W. Hough, president, on the Life Association to his (Davis') order at one day's sight, and accepted by said Life Association. After an examination of the list and full discussion thereof, the following resolution, offered by Mr. Bogy, was adopted:

"*Resolved*, That the vice-president be authorized to sell and deliver to Mr. George J. Davis the following securities, or any one or all of said securities, at the price named in the list hereto appended, and that the vice-president be authorized to receive in payment for the securities so sold and delivered the draft of H. W. Hough, president, drawn at one day's sight, to the order of G. J. Davis, and by him indorsed on the Life Association of America, and by said Life Association accepted." Then follows a list of the securities sold (which are the same mentioned in the contract between Davis and the Life Association), with prices annexed to each, amounting in the aggregate to $1,111,898.34. Among the securities thus sold to Davis were the notes of the defendants, which were afterwards duly indorsed by the Insurance Company and delivered to him. Davis having delivered the stock and other securities to the Life Association under the contract of November 3, 1875, received in payment some cash and the draft of the Life Association for $1,111,898.34. This draft Davis indorsed and delivered to the Insurance Company on the 10th December, 1875.

In the proceedings of the board of directors on that day, it is set forth that the president of the company stated to the board for its information "that Mr. G. J. Davis had tendered him this day the draft as specified in the resolution of the board, passed November 30th, in the sum of $1,111,898.34, and that in accordance with the authorization of said resolution he had sold and delivered to Mr. Davis the securities named." At the conclusion of this transaction the directory of the Insurance Company resigned and the Life Association, now the holder of the stock of the former company, elected a directory composed mainly, if not altogether, of the same persons who constituted the directory of the Life Association.

In 1876, by an amendment of its charter approved by the superintendent of the insurance department of the State, the name of the company was changed to the Columbia Life Insurance Company, and it was authorized by a two-thirds vote of its board of directors to reduce the capital stock of the company, then 10,000 shares of the par value of $100 each, to any amount not less than $100,000. To effect this reduction, the surplus assets of the company might be used to purchase in the stock of the company. Under this authority the directory resolved on a reduction of 9,000 shares of the capital stock, and to effect the reduction, set aside $900,000 alleged surplus funds and afterwards purchased that number of shares at par—$900,000—from the Life Association, and paid therefor by cancelling that amount of the draft of the Life Association given by it to Davis, and by him indorsed to the Life Insurance Company under its contract for the purchase of its securities. The balance of that draft, viz.: $211,898.34, was liquidated by cash payments and other transactions between the companies.

The Life Insurance Company continued to be a going concern until it was adjudged to be insolvent. The evidence is conflicting as to whether it was, in fact, a solvent institution in December, 1875, but it was reputed solvent and to be doing a profitable business, and its stock was then worth par in the market.

The Life Association is still a going concern. The superintendent of the insurance department, in the proceedings in which the company was adjudged insolvent, made no complaint against the reduction of the stock of the company nor the sale of its securities to Davis; nor has the company or any stockholder or creditor, or the receiver had

these transactions annulled by a direct proceeding for that purpose or taken any steps to that end so far as this record shows.

The bill does not allege, nor do the proofs disclose the condition of the company, otherwise than generally that it is insolvent; nor are the equities of any of the creditors disclosed; nor does the bill offer to surrender up to defendants the shares of stock they sold to Davis, or make any suggestion in relation thereto, other than that it is worthless.

W. W. Smith and *Smith & Collins*, for the plaintiff; *Tappan & Horner*, for the defendants.

CALDWELL, J.:

The board of directors of the Insurance Company had an undoubted right to sell the defendants' notes and other securities to Davis, and authorize its secretary to indorse them as was done. Banks, insurance companies, and other like corporations, have the power to take and hold negotiable notes and other securities in the general conduct of their business, and this includes the power to negotiate them. Hardy v. Merriwether, 14 Ind., 203; McIntire v. Preston, 5 Gilm., 48; Nichols v. Oliver, 36 N. H., 218; Spear v. Ladd, 11 Mass. 94; Northampton Bank v. Pepoon, Id., 288; Lester v. Webb, 1 Allen, 34. The notes were negotiable and their assignment and delivery invested Davis with the legal and equitable title to them and the right to receive payment and cancel them. He did receive payment from the makers—the defendants—in shares of stock in the company, then worth par in the market, and cancelled and surrendered up the notes to them.

The amended answer and the deposition of J. J. Horner, make it certain that the defendants, in this case, had no knowledge or suspicion personally, or through their agents, that Davis had obtained their notes by fraud, or that there was any infirmity in his title; and, having paid the notes in good faith to Davis, the indorsee and holder, the plaintiff can not compel the defendants to pay the notes a second time, even if Davis was a fraudulent holder. Payment to the thief or finder himself, if a negotiable note transferable by delivery, will discharge the maker, provided such payment was not made with knowledge or suspicion of the infirmity of the holder's title, or under circumstances which might reasonably awaken the suspicions of a prudent man. Byles on Bills, 213. Nothing short of fraud, not even gross negligence, if unattended with *mala fides*, will invalidate the payment so as to take away the rights founded thereon. Story on Bills, § 416; Edwards on Bills, § 537.

The bill counts upon the notes exclusively; it does not seek a recovery upon a stock subscription, nor does it even allege that the notes were stock notes. The answer discloses that the notes were given for a subscription to the capital stock of the company, but that fact did not render the notes any the less negotiable, or prevent the company from negotiating them, or excuse the defendants from paying them to the indorsee and holder; and when paid in good faith to the holder, the company can have no claim against the makers, either upon the notes or for the original consideration.

It is not true the defendants paid nothing of value for the notes. The shares of stock owned by the defendants were issued as full shares; the stock was then worth par in the market; the defendants refused to sell it for less, and Davis agreed to give par for it. The test is its then market value, and not what it was really worth in the light of subsequent events.

The company having indorsed and transferred the notes to Davis, it is not open to it to object that he discharged the debt for an inadequate consideration, if the defendants had no notice of the alleged fraud and acted in good faith. If Davis had been a *bona fide* holder of the notes, he could not successfully maintain that they had not been fully paid, and no more can the company.

The bill is fatally defective for want of proper parties. The *gravamen* of the plaintiff's bill is that Davis and the Life Association, acting in concert, fraudulently procured the assignment and transfer of the defendants' notes from the company to Davis. It is not alleged in the bill, nor was it claimed in argument, that defendants were parties to that fraud; it is claimed that their agent only had notice of it before paying the notes.

Obviously the plaintiff has no case, unless he can impeach and set aside the sale and transfer of these securities to Davis. Davis ought to be a party to any bill seeking to do this. He is entitled to an opportunity to repel the imputation of fraud, and protect himself from liability, if he can do so; the defendants are entitled to his aid in defending the action; and as he would be liable over to the defendants, in the event of the plaintiff's recovering, he must be made a party for the protection of the defendants, and to avoid multiplicity of suits. Robertson v. Carson, 19 Wall. 94.

The defendants have a right to insist that Davis shall be brought in; and on the averments in the bill the Life Association also—because if they are compelled to pay their notes a second time, they are entitled to an action over against these parties, to be reimbursed the amount paid them or Davis, in satisfaction of their notes, which would be the par value of their stock, that being the market value, as well as the agreed value between Davis and the defendants. But as Davis and the Life Association are not made parties, it would be open to them in any suit that the defendants might bring against them, to be reimbursed the amount of plaintiff's recovery, to contest the question of fraud in the transfer of these securities to Davis, and it might result that the court or jury trying that issue would find the transfer was not fraudulent, and thus the defendants would be wronged in a mode that would leave them no redress. Equity will not permit a plaintiff to put a defendant in this predicament. The rule is well settled, that where, in the event of the plaintiffs succeeding, the defendants will be subjected to undue inconvenience, or to danger of loss or to future litigation, or to a liability under the decree more extensive and direct than if the absent parties were before the court; or will thereby acquire a right to call upon the absent parties either to reimburse him the whole or a part of

the plaintiffs demand; then such absent parties must be brought before the court in order that the rights and liabilities of all may be settled by one proceeding and a multiplicity of suits avoided, with a possible different determination of the same issue, to the irreparable injury of the defendant sued. Story's Eq. Pl., secs. 136, 138; 1 Daniel's Ch. Pl. & Pr. 281, 282; Robertson v. Carson, 19 Wall. 94; Milroy v. Stockwell, 1 Carter (Ind.), 35.

Anticipating this objection, and with a view to avoid it, the plaintiff alleges in his bill that Davis and the Life Association are beyond the jurisdiction of the court and citizens of the same State as the plaintiffs, and cannot therefore be made parties without ousting the jurisdiction of the court. The learned counsel for the plaintiffs argued earnestly that these averments, under the act of Congress of February 28, 1839 (sec. 737, Rev. Stat.), and the 47th equity rule, dispensed with the necessity of making these parties defendants.

This argument has often been made before, and always unavailingly in a case like this. The Supreme Court of the United States have divided parties to suits in equity into three classes: (1) formal; (2) necessary or proper; and (3) indispensable. The first two classes may be dispensed with; the third, never. The absent parties in this case are indispensable parties, as that term is defined and applied by the Supreme Court. The act of Congress and the 47th rule effected no change of the law on this subject of parties to suits in equity.

In the leading case upon this subject the Supreme Court say, "The act of Congress does not affect any case where persons are not joined, because their citizenship would defeat the jurisdiction; and so far as it touches suits in equity it is no more than a legislative affirmance of the rule previously established by the decisions" of that court. "And the 47th rule is only a declaration for the government of practitioners and courts, of the effect of this act of Congress and of the previous decisions of the court on the subject of that rule. It remains true, notwithstanding the act of Congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice can not be done between the parties to the suit without affecting these rights, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Shields v. Barrow, 17 How. 130. And in a late case the court say: "The act of Congress of 1839, and the rule of this court upon the subject give no warrant for the idea that parties whose presence was before indispensable could thereafter be dispensed with." Ribon v. Railroad Co., 16 Wall. 450; and the rule established in these cases has been affirmed, illustrated and applied in many other cases. Florida v. Georgia, 17 How. 508; Coiron v. Millaudon, 19 Ib. 115; Barner v. Baltimore City, 6 Wall. 284; Florence Sewing Machine Co. v. Singer Manfg. Co., 8 Blatch. 127; Tobin v. Walkenshaw, 1 McAlister, 26; Litchfield v. The Register & Receiver, 1 Woolworth, 299. The ruling in Robinson v. Carson, 19 Wall. 94, is directly in point in this case, and concludes the question.

Counsel for plaintiff urge that the rules as to parties in equity are somewhat flexible; that the 47th rule in terms empowers the courts to dispense with "necessary or proper parties, in their discretion," and attention is called to the case of Elmendorf v. Taylor, 10 Wheat. 152, where it is said the objection for want of parties does not affect the jurisdiction, but addresses itself to the policy of the court, and is subject to its discretion.

Neither the rule nor the case cited touch the question of indispensable parties; the term itself implies they can never be dispensed with. And the absent persons in this case belong to that class, and not only cannot be brought in on account of their common citizenship with the plaintiff, but they would not be permitted to come in: and in all such cases the court cannot act at all, but will leave the parties to terminate their dispute by other means. Florida v. Georgia, 17 How. 508; Florence S. M. Co. v. Singer Man. Co., 8 Blatch. 127.

And if the absent persons were not indispensable parties but only "necessary or proper," and if the 47th rule invested the court with the discretion to proceed or not with the case, in the absence of such parties, there is nothing in the case calling for an exercise of that discretion favorable to the plaintiff, but the reverse, as will be seen from a brief *resumé* of the case.

The bill only seeks to set aside the contract between Davis and the Company so far forth as it concerns the defendants' notes; it does not seek to set aside the contract as to the other securities embraced in it; nor does the plaintiff offer to repay what the Company received in cash on this sale of its securities or any part of it; or to surrender back to defendants their stock; or to place any of the parties in *statu quo*; nor does it seek to annul the subsequent action of the company by which it blotted out of existence nine-tenths of its capital stock including the shares formerly owned by the defendants, and which reduction was effected by using as cash the draft received from Davis on the Life Association. The validity of the company's action in reducing its stock $900,000 by the purchase of 9,000 shares from the Life Association, and its cancellation ought to be determined before any relief is granted; for if that action was valid, it amounted to a ratification of all that had gone before, and the company ought not to be heard to assert that Davis did not pay value for the securities transferred to him when it appropriated and used the draft received from him as money. But that transaction cannot be inquired into in this case, because the bill does not attack, or even refer to it; and if it did, the indispensable parties to its determination are not before the court.

Passing by the orignators, actors and participants in the alleged fraud, all of whom are citizens of the same State as the plaintiff and solvent, so

far as the record discloses anything on that subject; affirming the sale of the company's securities to Davis, so far as it profited; keeping all that was obtained by that transaction and the subsequent operations based on the fruits of that transaction; the plaintiff seeks a recovery against defendants, admittedly innocent of any participation in the alleged fraud, by proceeding in a mode that would deprive them of that sure recourse on the actual parties to the alleged fraud, to which they would be entitled, and in a mode that would probbly result in exempting the actual perpetrators of the fraud from liability altogether.

A plaintiff occupying this attitude has no claims to the favorable exercise of an equitable discretion on the subject of parties, if such discretion exists, which is not decided.

Objection for the non-joinder of necessary parties need not be taken by demurrer, plea, or answer, it is open to the defendant to make it any time; and it may, and, in a clear case, ought to be raised and acted upon by the court on its own motion.

These conclusions render it unnecessary to decide whether the transactions between Davis and the Life Association and the Life Insurance Company were or not fraudulent or to rule upon the other questions presented at the hearing.

Decree dismissing bill.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF KANSAS.

July Term, 1879.

LEASE— VERBAL AGREEMENT.— A verbal agreement to lease lands for the term of one year, to commence from a future day, is void, under section 6, ch. 43, General Statutes, 505. Judgment reversed. Opinion by HORTON, C. J.— *Wolf v. Dozer.*

LIABILITY OF DIRECTORS.—A, the holder of stock in a bank incorporated under the laws of the State, made an attempted sale of his stock to the bank. The transaction was had with the directors, but the purchase was in the name of and for the bank. The directors had no power to make such a purchase, and the bank subsequently repudiated the transaction. In an action against the directors: *Held*, that there being no misrepresentation on their part, no wrong by them in act, statement or omission, and their want of power a matter of law as open to the knowledge of plaintiff as themselves, they were not personally responsible. Judgment affirmed. Opinion by BREWER, J. VALENTINE, J., concurring. HORTON, C. J., not sitting.—*Abeles v. Cochran.*

CONVEYANCES BETWEEN HUSBAND AND WIFE— HOMESTEAD — PROTECTION OF HOMESTEAD FROM CREDITORS.—1. A husband may convey real estate directly to his wife, and the conveyance will be upheld as valid, so far as it is equitable to uphold the same. Thus, where a husband owed money for a certain piece of land (not his homestead), and for the purpose of procuring money to pay on said land, he and his wife executed two mortgages on their homestead, but before the wife would sign the second mortgage the husband was required to and did enter into a parol agreement with his wife that he would deed to her said land (not the homestead), and said money was thus raised and paid on said land; and afterwards, in fulfillment of said agreement, the husband deeded said land to his wife; and all of this was done as a security for the protection of the homestead against said mortgages: *Held*, that the deed will be upheld as valid, to the extent of making the land conveyed by it a security for the payment of said second mortgage, and this notwithstanding the fact that the husband at the time he made said agreement and said deed owed debts which are still unpaid, and the creditors are now seeking in this action to have said deed set aside and held invalid. And further *held*, that the incumbering of the homestead by the wife's executing said second mortgage was a sufficient consideration on her part for said parol agreement and said deed, and that after said parol agreement was fully executed and fulfilled by the execution of said deed, the statute of "frauds and perjuries," relating to parol agreements concerning lands, had no application. 2. Where a husband and wife have mortgaged their homestead to secure the payment of a debt, and afterwards in good faith execute a second mortgage on another piece of land to secure the same debt, and in consideration therefor take from the mortgagee a written agreement that if he is compelled to resort to judicial proceedings to procure payment of his claim, he will first exhaust the other land before proceeding against the homestead: *Held*, that such agreement and said second mortgage are valid, and this notwithstanding the fact that the mortgagor owed other debts at the time he executed said second mortgage, which debts are still unpaid, and the creditors are now seeking in this action to have said agreement and said second mortgage held to be invalid. And further *held*, that under the constitution and statutes of Kansas, it is not illegal or fraudulent to hold property in a homestead exempt from the claims of general creditors; and the right of the homestead occupants to so hold such property is paramount to any right of any general creditor. Equity therefore (as guided and directed by the constitution and statutes of this State) favors the protection of the homestead from the claims of creditors; and generally whatever is done in good faith for the protection of the homestead from creditors is not looked upon as a fraud or as illegal, but is looked upon as a proper and legitimate transaction. 3. The rights and priorities of the various parties in this case determined and stated in the opinion. Judgment reversed. Opinion by VALENTINE, J.—*Sproul v. Atchison National Bank.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[Filed June, 1879.]

SAVINGS BANK —AUTHORITY OF TREASURER TO INDORSE NOTES — INCONSISTENT COUNTS.—1. The vote of the board of investment of a savings bank to sell certain notes held by it, does not authorize its treasurer so to indorse them as to impose the liability of indorser upon the bank. 2. Authority to indorse is not to be inferred from the nature of the office of treasurer of a savings bank. 3. Where the plaintiff sues the defendant as indorser on notes which he has bought, and thereby affirms the contract of purchase, he can not, by adding a count for money had and received, and by provisionally surrendering the notes into the clerk's hands, maintain his action on the inconsistent ground that the contract of purchase is not binding on him, because when he bought them they were falsely rep-

resented to be indorsed by the defendant. Opinion by SOULE, *J.—Bradler v. Warren Five Cents Savings Bank.*

FIXTURES—FURNACE—GAS FIXTURES.—1. A portable furnace not having any peculiar adaptation to the house in which it was placed, or being essential to the enjoyment of the estate, or intended otherwise than as furniture in the same sense in which a stove is furniture, is not part of the realty. 2. Gas fixtures, whether in the form of chandeliers suspended from the ceiling or projecting as brackets from the perpendicular walls of a room, though attached to the gas-pipe by screws and made tight by cement, are in the nature of furniture, and do not lose their character as chattels by reason of the manner in which they are affixed. Guthrie v. Jones, 108 Mass. 191 Opinion by SOULE, *J.—Towne v. Fiske.*

PROMISSORY NOTE—FRAUD—NOTICE.—One Law, who was a member both of the firm of John Savey's Sons and of Parker & Co., made a promissory note payable to the order of Parker & Co., which he signed and indorsed thereon the firm name of "John Savey's Sons," the defendants, without the knowledge or consent of the other partners, and in fraud of the firm. The firm name of Parker & Co. was indorsed thereon in blank by Demerritt, a member thereof, who, before its maturity, offered it to the plaintiff bank for discount. The note was at once discounted by the bank on the credit of the parties to it, and the avails paid to Demerritt. The bank had no knowledge or notice of the fraud other than what was to be inferred from the form of the note or the facts above stated. The court having ruled that the plaintiff was as matter of law affected with notice of the defense existing to the note on the part of the defendants other than Law, it was *held* erroneous, and a new trial ordered. Opinion by COLT, *J.—Freemans Nat. Bank v. Savey.*

PROMISSORY NOTE — COLLATERAL SECURITY — NOTICE.—The plaintiff bank discounted a note of G for K, the second indorser thereon, and the avails were paid to him. At the same time, and as a part of the same transaction, the note of the defendants, upon which this suit was brought, was delivered by K to the bank as collateral security for the G note. The note in suit was given without the knowledge or consent of the defendant firm, and the firm had no consideration for it. Upon the back thereof K, before delivering it to the bank, had made the following memorandum: "This note is held by me for note signed G," etc., pursuant to the understanding betwecn K and the member of the defendant firm who made it. Both notes were dated on the same day, were given for the same amount, and were made payable at the same time. *Held*, that the knowledge derived from the face of the two notes and the memorandum written upon the one in suit was sufficient to charge the bank with notice that the note in suit was given as security only for the payment of the G note. Opinion by COLT, *J.—National Security Bank v. McDonald.*

CO-TENANTS—CONVERSION BY ONE.—The plaintiffs hired and leased of the defendant, by written lease, "the following described goods and chattels, viz., one undivided half interest in the printing office at No. 9 Change avenue, Boston, composed of one Gordon press," etc., for the use or rent of which they agreed to pay certain installments "until the sum so to be paid for use or rent shall amount to the sum of three hundred dollars, and at which time all rents and claims of (the defendant) for said goods and chattels are to cease." The plaintiffs had paid, as they fell due, all said installments, excepting the last one, which was not then due, when the defendant, the plaintiffs forbidding it, came and took away roller arms, the fly wheel and fonts of type mentioned in the lease, effectually destroying the usefulness of the "printing office." The articles which he removed were incapable of use by him, and those which he left were incapable of use by the plaintiffs. *Held*, that under the most favorable construction for the defendant the parties to the agreement became tenants in common of the "printing office," and that the defendant was liable in an action of tort for the conversion of the articles so taken. Daniels v. Daniels, 7 Mass. 135; Weld v. Oliver, 21 Pick 559; Delany v. Root, 99 Mass. 546; Warren v. Abbey, 112 Mass. 355. Opinion by SOULE, J.—*Needham v. Hill.*

SUPREME COURT OF NORTH CAROLINA.

June and July Terms, 1879.

USURY—PROMISSORY NOTE.—An action does not lie to recover back usurious interest which has been paid by the debtor. Hence, to an action upon a note, the debtor can not set up as a counterclaim or set off, the usurious interest paid by him in successive renewals of the note. Opinion by DILLARD, J.—*Merchants Bank v. Lutterloh.*

ATTORNEY AND CLIENT — PAYMENT TO ASSOCIATE COUNSEL.—A payment by the defendant to one of two counsel who has been for seven years attorney of record for the plaintiff in the case, is binding on the plaintiff, though in fact he did not employ the associate counsel to whom the payment was made, and was not aware of his appearing for him. Opinion by SMITH, C. J.—*Rogers v. McKenzie.*

CRIMINAL PROCEDURE — GRAND JURY—EFFECT OF RETURN OF "NO BILL."—When a grand jury has returned a bill "not a true bill," and such finding is entered, the same bill can not be reconsidered by them, though a new bill perhaps may be sent. The practice which has grown up, when the grand jury has found a defective bill, of sending it back for amendment is rather tolerated than warranted by law. Opinion by ASHE, J.—*State v. Brown.*

SALE—RATIFICATION.—A gin was left by the plaintiff in the possession of the defendant for safe-keeping, who sold it to A without any authority. Subsequent to the sale, the defendant met the plaintiff and told him of the sale, to which he replied, "very well go ahead and collect the money and remit." *Held*, that this was a ratification of the sale, and the plaintiff's subsequently meeting the defendant and saying to him, "I do not know A in the transaction, but shall look to you," to which the defendant made no reply, did not fix on him the responsibility for A's debt, an implied promise being without consideration besides being void under the statute of frauds. Nor did the plaintiff have the power to withdraw his ratification. Opinion by ASHE, *J.—Rowland v. Barnes.*

PRACTICE—STATUTE OF LIMITATION AS APPLICABLE TO BANK NOTES—LIABILITY OF STOCKHOLDER.—1. While an answer, controverting allegations in the complaint, remains on file, it is irregular to entertain a motion to dismiss. 2. A motion to dismiss on the ground of the statute of limitations can not be maintained, as it can only be taken advantage of by answer. 3. The face of a bank bill is not evidence of the date of its issue, as they are constantly paid into the bank and re-issued. 4. The statute of limitations, in its ordinary acceptation, does not apply to bank bills intended to circulate as money. 5. The statute begins to run upon the personal (statutory) liability of the stockholders from the time when the bank refuses and ceases to redeem and is notoriously insolvent. 6. Whether that point of time is the date of suspension

of specie payment, as held in Godfrey v. Terry, 97 U. S. 171, it is not necessary now to decide. 7. Where the complaint is entitled and drawn as a creditor's bill, it is sufficient, though the summons is not so framed, and it need not be, as it is a mere notice of the action and refers to the complaint for the nature of the proceeding. 8. The court intimate strongly that the act of March 12, 1866, for winding up the business of banks can not impair the rights of prior creditors, but holds a direct decision on the point to be not now necessary. Opinion by SMITH, C. J.—*Long v. Bank of Yanceyville.*

SUPREME COURT OF MISSOURI.

April Term, 1879.

TAXES — VENDEE LIABLE WHEN IN POSSESSION UNDER CONTRACT TO PURCHASE. — Where vendee enters into possession of land under contract of purchase, though there has been no deed, and the legal title is still in the vendor, tne vendee is liable for taxes. Affirmed. Opinion by HENRY, J.—*Farber v. Purdy.*

STOCKHOLDERS MEETING AND VOTING OF STOCK —SUIT TO ENJOIN—ESTOPPEL OF STOCKHOLDER S. —In a proceeding by a stockholder of defendant company against it and one D and others to enjoin the stockholders of the company from holding a meeting and to cancel and declare void 1518 shares of its stock issued the Keokuk Packet Co., and transferred by the latter to D, and to enjoin the directors from recognizing said D as the owner of said stock, and to restrain him from controlling or voting said shares of stock: *Held*, that the plaintiff having accepted stock in the defendant company after the transfer to the said company of $152,000 on payment of 1520 shares of stock issued to to the Keokuk Packet Co., is estopped to ask the cancellation of the stock so long as the company in which he is a stockholder retains the money paid for the stock. Affirmed. Opinion by NORTON, J.—*Buford v. Keokuk Northern Line Packet Co.*

TAX SALE — DEED OF TRUST — EQUITY OF REDEMPTION — JUNIOR INCUMBRANCES — DISTRIBUTION OF PROCEEDS OF SALE THEREUNDER.—In March, 1871, W E sold the south half of a lot owned by him, to C E, who entered into possession and built on it, but took no deed till April 29, 1873. After sale, W E, with consent of C E, executed a deed of trust to plaintiff as trustee, dated November 22, 1872, covering the whole lot, to secure a debt of $172.69, and also on April 29, 1873, he executed a second similar deed of trust on the same property to secure a note of $500. On September 25, 1873, the property was sold to defendant for $19.58 under judgment against W E alone, rendered on a special tax bill, the lien of the judgment dating under the provisions of the city charter from November 11, 1872, when the city engineer receipted for the tax bill. In January, 1874, the beneficiaries in the trust deed sold their note for $172.69 to O C D who, on February 23d, following, to redeem said property from the sheriff's sale, tendered defendant the amount of his purchase-money with interest. On February 24, 1874, plaintiff as trustee in first deed of trust, sold the property to O C D for $1,800. On April 27, 1874, in a suit against C E, judgment was rendered for the enforcement of a mechanics' lien on the south half of said lot. The city charter provided that parties interested in the land and not made defendants should not be affected by judgments on special tax bills, and that if they claimed through or under any parties defendant prior to suit brought, they might redeem from the purchaser and otherwise assert their rights according to equity and good conscience. *Held*, that the rights of C E, he not being a party to the tax bill suits, were not affected by the judgment thereon; that O C D not having been made a party to the suit on the tax bill, had a right to redeem (2 Wis. 533), but only on petition in equity, from the defendant; that the judgment and sale under the tax deed only extinguished the right of W E to redeem therefrom, while in other respects it gave to defendant only the rights of a mortgagee, and his interest was subject to redemption by subsequent incumbrancers who were not parties to the tax suit, and that the proceeds of the sale under the deed of trust should have been applied first to the satisfaction of the two trust deeds and the mechanics' lien, judgment in the order of their priority, and the remainder divided between W and C E, according to their interests in the property, and that the defendant who held the first lien was entitled to no part of it; the general principle being enunciated that when a first mortgage has been foreclosed, without making a second mortgagee a party, the second mortgagee may redeem the first mortgage, and the mortgagor still having the right to redeem the second mortgage may by so doing acquire the right of the second mortgagee to redeem the first (Goodman v. White, 26 Conn. 317); and as the mortgagor has the right to redeem the second mortgage on foreclosure of it without making the first mortgagee a party, the mortgagor is entitled to the surplus remaining after the foreclosure of the second mortgage, and any junior incumbrancers who were made parties, or who were paid by consent. Reversed and remanded. Opinion by HOUGH, J.—*Olmstead v. Tarsnay.*

SUPREME COURT OF INDIANA.

May Term, 1879.

TAXES—INJUNCTION.—The personal property of the owner is the primary fund out of which all State and county taxes assessed against him are to be collected; but the fact that a delinquent party had personal property which the tax collector could have demanded, and out of which he could have made the taxes, and failed to do so, does not, under the statute, save the delinquent tax-payer from the penalty or release him from the tax. It is his duty to pay his taxes. A party seeking an injunction to restrain the collection of taxes, some of which are alleged to have been illegally assessed, will not be entitled to the writ until he has paid or tendered payment of the portion of the taxes legally assessed. Opinion by PERKINS, J. — *Foresman v. Chase.*

CRIMINAL LAW—FORMER ACQUITTAL—PRACTICE. —That no person shall be put in jeopardy twice for the same offense is a common law rule, generally adopted in all the States of the Union. This provision has not, however, been interpreted and applied uniformly. The true rules, deducible from principle and authority, are: 1. Where the facts constitute but one offense, though it may be susceptible of division into parts; as in larceny, for stealing several articles at the same time, belonging to the same person; a prosecution to final judgment for stealing a part of the articles, will be a bar to a subsequent prosecution for stealing any other part of the articles stolen by the same act. 2. Where the facts constitute two or more offenses, wherein the lesser offense is necessarily involved in the greater, as an assault is involved in an assault and battery; and where the facts necessary to convict on a second prosecution would necessarily have convicted on the first, then the first prosecution to final judgment

will be a bar to the second. 3. But where the same facts constitute two or more offenses, the lesser offense is not necessarily involved in the greater; and where the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act. An indictment for the murder of the unnamed child of Elizabeth Bradburn, is not the same as an indictment charging the employment of certain means with the intent to procure the miscarriage of Elizabeth Bradburn. Opinion by BIDDLE, J.—*State v. Elder.*

INSURANCE—EVIDENCE—FRAUD.— Action upon a policy of insurance upon a wharfboat lying at Evansville, on the Ohio river, where it was afterwards destroyed by ice. The policy insures against fire, and the perils of lakes, rivers, etc., being both a fire and marine policy. On the trial the appellant offered to prove that the mouth of Green river, eight miles above Evansville, is a safe ice harbor, and that the boat could have been towed there and saved. This evidence was properly rejected. It would have tended to contradict the written terms of the policy, which insured the boat "lying at the wharf in the city of Evansville," and did not insure in the mouth of Green river, or on its passage thereto. Wood on Ins. 208; 21 Wend. 367. Evidence to show a notification by the appellant to appellee to move his boat to Green river, was also properly rejected. There was no custom, or law, or no stipulation in the policy requiring him to so remove the boat. The wharfboat was built at the wharf at Evansville, to be used at that place. It was not adapted for removal. There was no fraud in appellee keeping his boat at the wharf. Fraud can not be predicated upon acts which the party charged has a right by law to do, nor upon the non-performance of acts which by law he is not bound to perform, whatever may be his motive, design or purpose, either in doing or not doing the acts complained of. Opinion by BIDDLE, J.—*Franklin Ins. Co. v. Humphrey.*

SUPREME COURT OF ILLINOIS.

[Filed at Springfield June 20, 1879.]

PROMISSORY NOTE—NOTE GIVEN IN RENEWAL—CONTEMPORANEOUS ORAL AGREEMENT. — This action was brought on a promissory note. To the declaration defendant pleaded two pleas: 1st. The general issue; and, 2d, a special plea in which it is set forth that the note declared on was given in renewal of other notes given for certain territory for a patent "washing machine," and in consideration thereof plaintiff agreed and promised defendant to accept in full payment of the new note a certain interest in a patent right for "pruning shears," which interest was to include the State of Iowa, when the same should be issued to defendant, and that afterwards such patent was issued to defendant, and thereupon defendant tendered to plaintiff a good and sufficient deed for such patent for the territory embraced in the State of Iowa, and that they are still ready and willing to deliver the same. Demurrer was interposed to the second plea, which was sustained, and defendant comes to this court by writ of error. The principal question made is as to the decision of the court sustaining the demurrer to the special plea. SCOTT, J., says: "It will be observed it is not averred in the special plea that there has been any failure of the consideration of the note which is the subject of litigation between the parties. According to the averment of the plea, it was given in renewal of a former note, to which it is not alleged there was any defense. But the substance of the defense, as set forth in the plea, is that by contemporaneous oral agreement plaintiff agreed to accept in payment of the new note an interest in a certain patent right for 'pruning shears,' which interest was to include all the territory of the State of Iowa. That was not the written agreement to which the parties had given their consent. The note by its terms was payable in money, and it is not understood how it could be changed or varied by contemporaneous oral agreement. If plaintiffs were indebted to defendants for a patent right, or any thing else, it might have been pleaded as a set-off to any thing that might be due to plaintiffs on the note in suit, but that was not done. Affirmed."—*Bristow v. Catlet.*

PRACTICE—PLAINTIFF NOT PRESENT WHEN CASE CALLED—DEFAULT AND DISMISSAL.—In this case an action was brought in the county court, and on the trial plaintiff recovered a judgment. Defendant appealed to the circuit court. The case stood on the docket of that court until the 20th day of November, 1876, when the appeal was dismissed for want of prosecution. On the 28th of the same month, defendant entered a motion to set aside the order dismissing the appeal, which was overruled, and defendant appeals to this court. The defendant stated in his affidavit filed in support of the motion that he was in the court a few days before the 20th of November to inquire when his cause would be reached, and was informed by his attorney that the call of the criminal docket would continue on the 20th, and that affiant need not be present on that day. But the civil docket was unexpectedly called on that day, and his suit was called whilst he was absent from town. CRAIG, C. J., says: "A party having a suit in court must be prepared for trial when it is regularly reached. He has no right to expect the court to delay its business to suit his convenience. In this case there does not appear to have been the slightest effort to prepare for trial. He, when he took the opinion of his attorney as to when the cause would be reached, did so at his peril. He does not show that he had witnesses or had subpœnaad them, or in fact had made the slightest preparation for trial. It is however urged that as the case was pending and at issue, the court had no power to dismiss the appeal; that the correct practice required the court to have called a jury, and let the plaintiff prove his cause of action, and that until the plaintiff proved a case against him he was required to do nothing in the case. In support of the action of the court below we are referred to 31 Ill. 291; 37 Ill. 372. There is no material distinction between this and those cases. There as here appellant bound himself to prosecute his appeal with effect. The mere execution and filing an appeal bond does not discharge that obligation. It imposes the duty of being present, ready for trial when the case is called regularly for trial." Affirmed. —*Lawler v. Gordon.*

REPLEVIN — LEVY OF EXECUTION ON STANDING CORN—LIEN OF LANDLORD ON CORN — ABANDONMENT OF DISTRESS WARRANT PROCEEDINGS.—This was replevin by appellee against appellant, a constable, for one hundred acres of corn. It seems that the constable, in accordance with certain executions placed in his hands, levied on the corn in controversy; that the said corn was farmed and raised by one B, who rented the ground of the appellees, and who agreed to pay a specified rent; that the said rent being due and unpaid, the appellee executed a distress warrant for the same, prior to the levying of the executions aforesaid, but that the parties settled the distress warrant proceedings by transferring to appellees the corn standing in the field, and that thereafter the executions were levied by the constable. Judgment

given for appellees. SCHOLFIELD, J., says: "Whether appellant would have been entitled to the possession of the corn had he, before the levy of the execution, or the commencement of this suit, tendered appellees the amount of the rent due, is a question not before us. Nor is it now material to inquire whether in any case the tenant can by contract alone with the landlord invest him with an absolute title to the property, upon which he has a lien for rent as against the claims of his judgment-creditors. The statutes provide that 'every landlord shall have a lien upon the crops grown or growing upon the demised premises for the rent thereof,' etc. We have held that this lien does not grow out of the levy of a distress warrant, that is a paramount lien, of which every person must take notice, and which can be lost only by waiver or failure to enforce it at the proper time. 67 Ill. 297; 77 Ill. 206. We are aware of no new principle upon which it can be asserted that the abandonment of the proceedings by distress can be held to be a waiver of the lien." Affirmed.—*Weitsel v. Mayers.*

DAMAGE — DETERIORATION IN VALUE OF PROPERTY BY GAS-WORKS — SUIT PROUGHT FOR CONTINUED DAMAGE — EVIDENCE—PROOF OF FORMER SUIT.—This was an action on the case by appellee against appellant. The declaration alleges that plaintiff has been and is possessed of certain dwelling premises of great value, and was in the enjoyment of pure water flowing from a fountain above said premises, through veins and apertures underneath and near the surface of the earth; that the defendant possessed certain premises used as gas-works, situated over and near said veins of water, and higher up the stream than the premises of the plaintiff; that the defendant knowingly continued to injure the plaintiff in the enjoyment of his premises by depositing upon the ground and into excavations in the earth near the veins through which the water flowed, divers noxious substances, and thereby rendered the water unfit for use. Plaintiff recovered. Defendant appeals. Appellant offered to prove on the trial a former recovery for depreciation to the value of the property of appellee, caused by the erection and maintenance of appellant's gas-works as they now are—their continuance being the sole basis on which the recovery in the present case can be predicated. SCHOLFIELD, J., says: "There is no question but that the offered proof sufficiently identified the parties, and the subject-matter of litigation. The court rejected the evidence and the question is, was this ruling right? The Ottawa Gas-light Co. v. Graham, 28 Ill. 73, is authority for the position that it was competent to recover in the first suit for the difference in the value of the property owing to the erection of gas or other offensive structnres in its vicinity. And in I. C. R. R. v. Grahill, 50 Ill. 241, it was held if the damages recovered were for deterioration in the value of the plaintiff's property, such recovery would be a bar to any further prosecution for the same cause. 75 Ill. 42. The court erred in rejecting the evidence." Reversed.—*Decatur Gas-light Co. v. Howell.*

BOOK NOTICES.

[NEW BOOKS RECEIVED.—Wharton on Evidence, second edition: Kay & Bro,, Philadelphia. California Reports. Vol. 52: A. L. Bancroft & Co., San Francisco. Nevada Reports, Vol. 13: A. L. Bancroft & Co.,San Francisco.]

CASES ARGUED AND ADJUDGED in the Supreme Court of the United States, October Term, 1877, and October Term, 1878. Reported by WILLIAM T. OTTO. Vol. 7. Little, Brown & Co. 1879.

This is the ninety-seventh volume of the reports of the Supreme Court of the United States. It contains about ninety cases reported in full, the most important of which have already appeared in that form or abstracted in the columns of this JOURNAL. The index is very thorough, the cross-references being frequent. The publishers' work is as usual all that can be desired. The price of the current volumes of this series is now only $4 per volume, and at this figure a lawyer can hardly afford to be without the reports of the highest court in the land.

We have received from the Chicago Legal News Company the LAWS OF ILLINOIS, passed by the thirty-first general assembly which convened on January 8th and adjourned May 31st. This book is compiled with head notes and references to the Revised Statutes of 1877.—— Of the articles in the July number of the BRITISH QUARTERLY REVIEW (reprinted by the Leonard Scott Publishing Co., 41 Barclay st., New York), the most interesting to lawyers is that on the City of Glasgow Bank Failure and Trial. The paper not only deals with the trial of the directors but discusses at length the late decision of the House of Lords, where it was held that trustees who had invested moneys of their *cestuis que trust* in the concern were personally liable to the creditors as partners in the company. The second of October came, says the writer, and found a crowd of names on the register of the City of Glasgow Bank, names of men who had no personal interest whatever in the funds they administered. The money was lost to the *cestuis que trust*—that was the first thought when the frightful defecit was announced. But who was bound to pay the further calls? The universal popular anticipation in Scotland was that it was the beneficiaries, the parties who had benefitted by the shares while they were valuable, and who must now, in justice, meet their disadvantages. It was they who ought to pay the burdens on the trust investment, at least to the extent that the trust estate supplied the money. Or if, formally, it was the trustees who were called upon to pay the debt, they could only be asked to pay it out of the remaining moneys in the trust estate, and to that extent. The idea that trustees who had properly invested the funds; who had, perhaps, been authorized or required by the trust to invest them, could be personally liable for the calls, was, for the first few days, scarcely credited. The parties had accepted the bank transfers simply "as trustees." When, as required by statute, the bank published its yearly list of stockholders, that the public might know on whose credit it had to contend, it never published the names of the trustees. It was always "the trustees of A. B. C.", etc. But the House of Lords held them liable, and the result has been to ruin a body of respectable men, some of them wealthy, and many of them of well known benevolence as well as probity. In treating the other branch of the subject—the prosecution of the directors — the writer concludes that "the moral of the trial seems to be that the law, both of England and Scotland, is swift to avenge deliberate misrepresentation on the part of directors, both by pecuniary reparation to the whole extent of loss, and by penal sentences."

QUERIES AND ANSWERS.

[The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]

*** The following queries received during the past week are respectfully submitted to our subscribers for solution, by request of the senders. It is particularly desired that any of our readers who have had similar cases, or have investigated the principles on which they depend, will take the trouble to forward an answer to as many of them as they are able.*

QUERIES.

14. A NOVEL CASE.—J. P. owned a large tract of land in Ohio, which was clear, and free of all incumbrances; neither did J. P. owe any other debts. His wife was dead, and he had five children living and one dead. There are three boys and two girls, all of full age. The child dead left issue of his body—one girl—who is also of full age and married. In the life-time of J. P. and M. P., who is the deceased child, J. P. advanced to M. P. all that they supposed would be his distributive share of J. P.'s estate at his father's death. J. P. took from M. P. a receipt in full, showing what it was given for, and in full satisfaction of his father's, "J. P.'s" estate. J. P. then, in the full enjoyment of all his faculties, one year and a half before his death, made a division of all his land into three parts, equally between his three sons living; made deeds to each one for their respective parts, and called his three sons to him and showed them these deeds for their land, telling them that, to insure him a home so long as he lived, he would hold these deeds himself until his death; also showing them where the deeds were to be kept, and saying that when he (J. P.) was dead, a man would tell them what to do with them. So he disposed of all his real estate that way, and his personal, he told his two girls, the three boys would sell after his death and pay them $500 each. Immediately after his death a magistrate told these three sons to get these deeds and have them recorded, which was done; and these sons had been in possession of their respective parts for two years and a half, when this granddaughter filed her petition for partition of all these lands, making all heirs party defendants. The questions in the case are: First, were there sufficient deeds to pass the titles; second, can this granddaughter maintain this action as against the receipt given by her father, as aforesaid. S. L. J.

Barnesville, Ohio.

---

15. CONSTRUCTION OF "ACTUAL RESIDENT." — A, an actual resident of Wisconsin, being indebted to B, goes to Iowa for the purpose, as he says, of looking up a place of business, leaving his family in Wisconsin. He rents a house in Iowa, in which to move his family and carry on his business. He then returns to Wisconsin for his family, boxes and loads upon a car his household goods and stock in hand, and declares his intention to go to Iowa. B attaches certain property of A which is exempt, if A if an "actual resident of Wisconsin." Rev. Stats. of 1878, sec. 2982, sub. 20. Is A an actual resident of Wisconsin, within the meaning of the statute? H. H.

---

16. A SELLS B A HORSE AND TAKES the negotiable note of B, with C as surety, to secure the purchase price. A transfers the note without recourse, and does not transfer the demand for the purchase price, otherwise than by selling the note, given to secure it. The note passes to several successive purchasers, and is paid by the surety to the last holder. C, the surety, afterwards sues the purchaser B for the amount paid, and produces the note, and shows he took it up as surety. Is the judgment so gotten by C against B one recovered "on a demand for the purchase price," and can the horse which is exempt, except upon an execution issued on a judgment for the purchase price, be sold to satisfy C's judgment?

Sherburne, N. Y. D. L. A.

ANSWERS.

No. 7.

[9 Cent. L. J. 59.]

Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect. Delivery is essential. Without actual possession the title does not pass. A mere intention, or naked promise to give, without some act to pass the property, is not a gift. There exists repentance (the *locus penitentiæ*), so long as the gift is incomplete, and left imperfect in the mode of making it. 7 Johns. N. Y. 26. The subject of the gift must be certain; and there must be the mutual and concurrent will of both parties. Delivery must be according to the nature of the thing. It will have to be actual delivery, so far as the subject is capable of delivery. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but the dominion. If the thing given be a *chose in action*, the law requires an assignment or some equivalent instrument, and the transfer must be executed. 1 Swanst. Ch. 436; 1 Dev. 309. But see 10 Johns. 293.

St. Louis, Mo. M. THOMPSON.

No. 5.

[9 Cent. L. J. 59.]

The statutory redemption law does not cut off or affect any right of redemption existing by the general principles of law, and held by one not a party to the judgment, decree or other judicial proceeding on which a sale of real estate has been made. Holmes v. Byber, 34 Ind. 262; 4 Kent's Com, 163. The time in which a party may redeem is determined by the particular circumstances of each case.

Versailles. Ind. G. D.

NOTES.

HON. BLAND BALLARD, of the United States District Court for the District of Kentucky, died suddenly at Louisville on the 29th ult. The cause of his death is supposed to have been apoplexy, or heart disease. Judge Ballard was born in Shelby county in 1819. He was highly esteemed by the people of Kentucky, and had filled many positions of trust and responsibility in Louisville, where he had lived for many years. He was appointed District Judge for Kentucky by President Lincoln in 1862, and during the past seventeen years has performed the duties of his office to the satisfaction of the people of Kentucky and the government.——The criminal law is not as uncertain in England as in Texas. An exchange says: "However strong the general arguments in favor of a criminal code may be, the uncertainty of the criminal law can hardly be advanced as one of them. While our reports teem with controversies in civil, commercial and ecclesiastical law, the disputations on points of criminal law are few and far between. Mr. Staveley Hill has obtained a return of indictments and of 'Crown Cases Reserved' for six years; and the figures illustrate, in a remarkable manner, the degree of certainty to which statutory and judicial exposition have brought this part of our law. The number of persons tried on indictments before all the courts of criminal jurisdiction in England and Wales, from 1873 to 1878 inclusive, was 88,832. During the same period the number of cases in which questions arose upon the interpretation of the law was 23; and the number of cases in which questions arose upon the application of the law to the facts was 61. Thus we have 84 as the total number of Crown cases reserved, or about one case in a thousand, in which any substantial legal difficulty arose."